IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 404

MELROSE DISTILLERS, INC., CVA CORPORATION AND DANT DISTILLERY AND DISTRIBUTING CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF PETITIONERS

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For brevity and convenience the Petitioners will be referred to in this brief as "Melrose", "CVA" or "Dant" or as "Petitioner" or "Petitioners" either singly or in combination, as may best serve the context.

The use of *italics* herein indicates emphasis supplied, except in the entitling of authorities or as otherwise expressly stated.

References to the printed record will be, for example, (R. 10).

OPINIONS BELOW

The opinion of the Court of Appeals is reported in *258 F. (2d) 726-730*, and appears in (R. 68-74).

The opinion of the District Court is reported in *138 F. Supp. 685-709* (that portion of it which pertains to the Question Presented commences on page 706) and appears in (R. 40-52).

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1958 (R. 74). The jurisdiction of this court is invoked under *Sec. 1254(1), Title 28, U.S.C.A.* which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

The petition for writ of certiorari was filed in the office of the Clerk of the Court on September 26, 1958, and granted by this Court (limited to Question No. 1 presented by the petition) on November 10, 1958 (R. 75).

STATUTES INVOLVED

Federal Antitrust Statutes

The statutes under which Petitioners were indicted in the District Court were Sections 1 and 2 of the Sherman Anti-trust Law, hereinafter immediately following.

Section 1, Title 15 U.S.C.A. (July 2, 1890, c. 647, Sec. 1, 26 Stat. 209; as amended August 17, 1937, c. 690, Title VIII, 50 Stat. 693) provides, verbatim:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: PROVIDED, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or

the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any state, territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section 45 of this title: PROVIDED FURTHER, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 2, Title 15 U.S.C.A. (July 2, 1890, c. 647, Sec. 2, 26 Stat. 209) provides, verbatim:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000; or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court."

Section 7, Title 15 U.S.C.A. (July 2, 1890, c. 647, Sec. 8, 26 Stat. 210) provides, verbatim:

> "The word 'person', or 'persons', wherever used in Sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country."

Since Petitioners were corporations at the time they were indicted and since an officer of each was indicted along with them, there is involved *Section 24, Title 15 U.S.C.A.* (Oct. 15, 1914, c. 323, Sec. 14, 38 Stat. 736) which provides, verbatim:

> "Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court."

Maryland Statutes

Since two of the Petitioners, Melrose and CVA, were Maryland corporations when indicted on April 6, 1955, and since they dissolved under the laws of Maryland on May 2, 1955, the Maryland statutes immediately following are involved. *Section 72(b), Article 23, Annotated Code of Maryland (1951)*, (now 76(b)) provides, verbatim:

> "The dissolution of the corporation shall be effective when the articles of dissolution have been accepted for record by the Commission, provided, however, that the corporation shall continue in existence

for the purpose of paying, satisfying and discharging any existing debts and obligations, collecting and distributing its assets, and doing all other acts required to liquidate and wind up its business and affairs."

and *Section 78(a)* (Now 82 (a)) id., provides, verbatim:

"The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed on them by law; nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be continued with such substitution of parties, if any, as the court directs. No receiver shall institute suit except by order of the court appointing him; and such suit be brought in his own name as receiver or, notwithstanding its dissolution, in the name of the corporation, to his use."

Delaware Statute

Since the Petitioner, Dant, was a Delaware corporation when indicted on April 6, 1955, and since it dissolved under the laws of Delaware on May 2, 1955, the Delaware statute immediately following is involved. *Section 278 of the Delaware General Corporation Law* (Sec. 278, Title 8, Del. Code, 1953) provides:

"All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or

proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions, suits or proceedings so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed."

QUESTION PRESENTED

On April 6, 1955, Petitioners, who were, respectively, two Maryland corporations and a Delaware corporation, and who were wholly owned subsidiaries of Schenley Industries, Inc., a Delaware corporation, were indicted in three counts (along with an officer of each of them, their corporate parent, and some forty-eight other defendants) for alleged violations of *Sections 1 and 2 of the Sherman Act* (Sections 1 and 2, Title 15, U.S.C.A.) (R. 1-12).

On May 2, 1955, Petitioners, Melrose and CVA, were duly dissolved under the laws of Maryland and Petitioner, Dant, was duly dissolved under the laws of Delaware (R. 15, 26, 22), all for commercial and legal reasons having nothing to do with the indictment (R. 20, 24, 31). On June 27, 1955, motions to dismiss as to these three petitioners (on the ground that they were dissolved) were filed on their behalf (R. 14, 25, 21) and later adopted into other motions, filed November 30, 1955, to dismiss on other grounds not here pertinent (R. 37-39).

On January 30, 1956, the District Court denied the motions to dismiss (R. 52-53) and some two years later on January 6, 1958, adjudged Petitioners (and others) guilty upon pleas of "nolo contendere" and sentenced them to fines aggregating $18,500 (R. 55-57). The Court of Appeals affirmed (R. 74). This Court granted the writ of certiorari to the Court of Appeals (R. 75) under which the sole question presented for review is:

"Can either a Maryland corporation or a Delaware corporation be further criminally prosecuted in a federal court for a federal offense after its dissolution under the applicable state law, where such dissolution occurs after indictment, before arraignment or plea, and timely appears of record in the case?"

STATEMENT OF THE CASE

An indictment (R. 1-12) covering the period from January 1950 to the date of its return was returned in the District Court on April 6, 1955, against 24 corporate and 31 individual defendants.

Among the 24 corporate defendants were the three Petitioners herein (R. 2) as well as their parent corporation, Schenley Industries, Inc., a Delaware corporation (R. 2) of which they were wholly owned subsidiaries (R. 46). Among the 31 individual defendants was an officer of each of the petitioners, described as having been actively engaged in its management, direction or operation and as having authorized, ordered or done some or all of the things charged against it (R. 3, 5).

The indictment, in a total of three counts, charged violations of *Sections 1 and 2 of the Sherman Act* (Sections 1 and 2, Title 15, U.S.C.A. supra) with respect to alcoholic beverages shipped into Maryland from manufacturers located outside of Maryland. The first Count alleged a conspiracy to fix and regulate prices (R. 8). The second Count alleged a conspiracy to monopolize trade and commerce (R. 11). The third Count alleged an attempt to monopolize trade and commerce (R. 11-12). The same conduct alleged in support of the first Count was re-alleged by reference to support the second and third Counts (R. 11-12), and the Government conceded that it had no direct evidence of a conspiracy but implied a conspiracy from the conduct alleged (R. 12-13).

On May 2, 1955, some 26 days after the indictment was returned, each of the three Petitioners was dissolved under the laws of the State which created it (R. 15, 26, 22), for commercial and legal reasons independent of the indictment (R. 20, 24, 31).

On June 27, 1955, a motion to dismiss the indictment as to each of the three Petitioners (because of its dissolution) was filed by its last directors (R. 14, 25, 21). These motions were later adopted and carried forward into other motions to dismiss (filed November 30, 1955) containing other grounds not here pertinent (R. 37-39).

While these motions to dismiss were pending and on June 28, 1955, Petitioners were arraigned and a plea of "not guilty" was entered for each.

On January 10, 1956, the District Court denied all motions to dismiss and that portion of its opinion pertinent to the question here presented is conveniently sub-headed as *"V. Motion to Dismiss as against Dissolved Corporations"* (138 F. Supp. 706 et seq.; R. 46-52).

Almost two years later, on January 6, 1958, the pleas of "not guilty" entered on behalf of these Petitioners on June 28, 1955, were withdrawn (R. 60, 62, 65) and a plea "nolo contendere" was entered on behalf of each and accepted by the court (R. 61, 63, 66) and thereupon Petitioners were sentenced to the following fines:

Melrose	$5,000 on Count One
CVA	$5,000 on Count One and $1,000 on Count Three
Dant	$5,000 on Count One and $2,500 on Count Three.

(R. 55, 56, 57).

Petitioners appealed to the United States Court of Appeals for the Fourth Circuit which, although holding that

the questions involved in the Petitioners' motions to dismiss in the District Court survived the pleas of "nolo contendere", affirmed the fines imposed by the District Court, on August 29, 1958 (*258 F. (2d) 726;* R. 68-74).

As a matter of factual background (not in this record but which cannot be disputed) indicative of "double punishment", if the fines against Petitioners are sustained and to be collected from their stockholders, is the fact that their sole stockholder, Schenley Industries, Inc., also pleaded "nolo contendere" to the same indictment and was fined $5,000 on each of Counts One and Three. It did not appeal. Furthermore, two individual defendants described in the indictment as Vice-Presidents, active in the direction and operation of Petitioners, Melrose and CVA, respectively, were also fined $2,500 each on their pleas of "nolo contendere" to the same indictment. They did not appeal.

SUMMARY OF ARGUMENT

(1) The lower courts failed to heed the essential and fundamental distinction which necessarily exists between civil or remedial liability and so-called "criminal liability".

(2) State statutes prolonging corporate existence for winding-up purposes after corporate dissolution are but the corporate equivalent of probate proceedings in the death of a natural person, within the ambit of this Court's equation of a corporate dissolution to the death of a natural person.

(3) The dominant object of criminal punishment is prevention of crime and is fully attained upon dissolution of the corporate offender and no public policy suffers if such dissolution abates a criminal prosecution against it.

(4) The stated statutory purpose of "post-dissolution" existence of a Maryland corporation excludes its criminal prosecution and fine. The 1957 change in that statute is a clue to its prior meaning.

(5) The statutory purpose of "post-dissolution" existence of a Delaware corporation excludes its criminal prosecution and fine although there is division among the circuits on the question. The *Collier* decision is erroneous.

(6) The phrase "action, suit or proceeding" has been construed by the Court of Appeals of New York, in a not-too-dissimilar setting, to mean "action" at law, "suit" in equity or a special "proceeding", but *not* a criminal prosecution.

(7) The "spark-of-life" theory has been rejected by this Court.

ARGUMENT

(1) There is a Fundamental Difference in Nature and Purpose between a Civil or Remedial Action and a Criminal Prosecution.

Concerning the Sherman Anti-trust Act, it was said in *Roseland v. Phister* (1942) 125 F. (2d) 417, 419, C.C.A. 7:

> "The Act is *penal* so far as *criminal* liability is concerned but is remedial insofar as it creates a remedy for damages."

The prosecution of Petitioners under the indictment returned on April 6, 1955, was, of course, completely penal. The object was to prove them guilty of violating criminal provisions of the Anti-trust Statutes of the United States to be followed by pecuniary fines which, in the discretion of the court, could be fixed at any amount from one cent to Five Thousand Dollars *(Secs. 1 and 2 Title 15, U.S.C.A.,*

supra). The object was *not* to prove a remedial liability against them or a liability to make whole. Citations are unnecessary (but available) to support the premise that a fine imposed in a criminal case is "punishment". Such a fine is always a "forfeiture" (although a forfeiture is not always a fine). It is synonymous with "mulct". These definitions emphasize that such a fine, in nature, is neither compensatory nor remedial as is a civil judgment where the aim is compensation of some pre-existing liability, whether contractual, tortious or statutory. Such a fine, upon payment, becomes *public* funds in the hands of the Government for Governmental purposes and such funds are not held as compensation or remedy to or for the benefit of anyone. The issue in the criminal case is not remedial liability to another but simply "guilt or innocence" of the public offense charged. Even where that issue is resolved *against* the accused it does not *necessarily* follow that he will suffer *any* punishment for it is within the discretion of the court to suspend imposition or execution of sentence under *Sec. 3651 Title 18, U.S.C.A.* Furthermore, under *Sec 1 and 2 of the Sherman Act* (Sec. 1 and 2 Title 15, U.S.C.A., supra) the *amount* of fine to be imposed upon proof of violation thereof is not fixed and certain but rests in the sound discretion of the court within the statutory maximum. The fine, when imposed, being in nature punitive only and in no wise compensatory or remedial, connotes no pre-existing or underlying pecuniary obligation of the defendant to anyone and thus can have no relation back to any previous detriment suffered by anyone at the hands of the defendant. Those factors, which inseparably inhere in the criminal prosecution, indubitably point the conclusion that a fine in a criminal case has and can have no existence until it is imposed and then, being punishment purely, it has no retroactive operation, signifi-

cance or implication whatever. Indeed, it would be difficult if not impossible to imagine a punishment operating retroactively. Can a convicted person be hanged today — *as of yesterday?* Can a convicted person be fined today — *as of yesterday?* This is the essential distinction between liability for a criminal fine and liability for a civil or remedial claim which seemingly was overlooked in the Courts below and which went unrecognized in the *Collier* case (*United States v. Collier* (1953) 208 F. (2d) 936 C.A. 7) upon which the Courts below largely relied. That the criminal fine has no existence until imposed and, when imposed, carries no backward liability, is a truism which finds practical expression in every application of the rule that the same person may be criminally prosecuted and fined for an unlawful act without in the least affecting his civil or remedial liability to any person injured thereby. Otherwise stated, no matter how large his fine in the *criminal* case, the defendant could not plead one penny of it either in mitigation or in defense of any *civil* liability arising out of the very same act for which he was fined. A good example of this is found in the treble-damage section of the Federal Anti-trust laws themselves (*Sec. 15, Title 15, U.S.C.A.*). This attribute of our law is clearest recognition that, while a criminal may escape *punishment* by dying (since only the criminal can be *punished* for the crime), his estate cannot escape *compensating* for the loss or injury which his criminal act has caused another. In the venerable case of *Fay v. Parker* (1873) 53 N.H. 342, 16 Amer. Rep. 270, it was said:

> "A synonym of 'damage' when applied to a person sustaining an injury, is 'loss'. Loss is the generic term. Damage is a species of loss. Loss signifies the act of losing, or the thing lost. 'Damage' (in French 'dommage'; Latin 'damnum', from 'demo', to take away) signifies the thing taken away — The lost thing

which a party is entitled to have restored to him, so that he may be made whole again. When used to signify the money which a plaintiff ought to recover, 'damage' is never nor in any sense synonymous with, nor collateral to, the terms 'example', 'fine', 'penalty', 'punishment', 'revenge', 'discipline', or 'chastisement'. Loss or damage sustained — the thing taken away — may be supplied by compensation; but the loss, damage, or thing taken away cannot be supplied or restored by the vindictive punishment of him who has occasioned the loss or damage."

(2) The Petitioners' "Post Dissolution Existence Was but the Equivalent of Probate Proceedings on the Death of a Natural Person.

In *Chicago Title & Trust Co. v. Wilcox Building Corp.* (1937) 302 U. S. 120, this Court said (124-125):

> "The decisions of this Court are all to the effect that a private corporation in this country can exist only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, *the result of which may be likened to the death of a natural person.*"

The question involved in that case was whether a dissolved Illinois corporation, which still had a limited existence or "spark-of-life" under state law, could avail itself of the Federal Bankruptcy Act which on its face was open to "*any* corporation" And which defined corporations as "all bodies having *any* of the powers and privileges of corporations". It will be recognized that the question, in principle at least, is not remote from that presented here; which will be more fully treated hereinafter.

When this Court equated the corporate dissolution to the death of a natural person, it drew a more accurate analogy, seemingly, than Respondent will admit. On the death of a natural person, his assets, subject to payment of

his debts, are equitably owned by his heirs or legatees. On dissolution of a corporation, its assets, subject to payment of its debts, are equitably owned by its stockholders (*Meredith v. Washington Loan & Trust Co.* (1926) 151 Md. 274, 134 A. 206 (209)). The first end to be attained in each case is payment of obligations *existing* at the date of death of the natural person or *existing* at the *dissolution of the corporation*. This limitation to obligations *existing* at the date of death of the natural person or of dissolution of the corporation is inescapable because no new obligations can be incurred by either the dead person or the dissolved corporation (except sometimes by statute, a dissolved corporation may borrow money for purposes of liquidating and winding up — a situation not here involved). The second end to be attained is distribution of the remaining assets in each case to those entitled to them.

Since, as we have seen, the issue in a criminal case is simply that of "guilt or innocence" of a public offense it seems to follow clearly that upon death of the individual offender or dissolution of the corporate offender, that issue becomes forever moot. No sentence of fine thereafter imposed could be an obligation of the deceased person *at the time of his death* or the dissolved corporation *at the time of its dissolution* because the fine, being punishment only, has no existence until it is imposed and then has no retrospective operation. In the case of these Petitioners, it will be recalled that their dissolutions occurred on May 2, 1955 (R. 15, 26, 22) and they were neither convicted nor fined until January 6, 1958, over 2½ years later (R. 55-57). Because of the essential difference in nature and purpose between criminal fines and civil judgments their fines were not, and could not have been, *existing* obligations or liabilities of Petitioners at the time of their dissolutions.

Statutes prolonging the life of a dissolved corporation are *remedial*, i.e., designed to afford a remedy for some obligation existing at the time of dissolution. For a specific instance, the Delaware statute was under discussion in *Bahen & Wright v. Com. of Int. Rev.* (1949) 176 F. (2d) 538 C.A. 4, when the court said 539):

"Statutes of this type are broadly remedial . . .".

and in *Sec. 8158 Fletcher Cyclopedia Corporations* (Perm. Ed.) it is said:

"Statutes for winding up the affairs of dissolved corporations are embodiments of equitable doctrines and afford legal remedy where before there was none. They are *remedial*, and should receive liberal construction."

and Sec. 8220, id:

". . . the statutory provision continuing corporations in existence for a limited time after dissolution does not extend the right to sue such corporations on *debts not in existence at the time of the dissolution.*"

Cited to the foregoing section is *Callahan v. Clemens* (1945 Md. Ct. of App.) 184 Md. 520, 41 A. (2d) 473 (476) wherein the court, speaking of a corporate dissolution in Maryland, said:

"Dissolution occurred on Feb. 23, 1939, and the rights of creditors *became fixed at that time.*"

Approaching this court's equation of a corporate dissolution to the death of a natural person from another viewpoint, one of the incidents of the death of a natural person is that it *abates* any criminal prosecution against him. The reason is simple. In such prosecution the issue is "guilt or innocence" and when the accused dies even after conviction and pending appeal, that issue is moot and the prosecution abates *ab initio*. There is an annotation to such

effect, replete with cases, entitled *"Death of Defendant Pending Appeal from Conviction as Abating Criminal Prosecution"* in *96 A.L.R. 1322*. In *List v. Pennsylvania*, 131 U.S. 396; and *Menken v. Atlanta*, 131 U.S. 405, it was held that:

> "The death of the accused in a criminal case brought here by writ of error abates the suit."

In *United States v. Mitchell* (1908 Cir. Ct., D. Ore.) 163 Fed. 1014, Mitchell had been convicted and fined for violation of a federal statute. While the case was pending in this Court on writ of error, Mitchell died. This Court held the case abated and dismissed the writ in *199 U.S. 616*. The Government then presented a claim for the fine against Mitchell's estate. The Circuit Court held that the fine could not be collected after Mitchell's death. It said (1016-1017):

> "A fine is a *pecuniary punishment* imposed . . . upon a person convicted of crime . . . Imprisonment, in its general sense, is the restraint of one's liberty. As a punishment it is a restraint by judgment of a court . . . and is *personal* to the accused. It is a thing self-evident, therefore, that the death of a person upon whom such a judgment is imposed would put an end to an *infliction or enforcement of the punishment*. A fine being a pecuniary punishment imposed upon the person, it would seem that a like result would follow. If the accused should die before the punishment was in reality enforced or inflicted, *he could not be pecuniarily mulcted or punished in person after he had ceased to exist*. In passing judgment, whether imprisonment or fine, it is the purpose of the court and the law that the accused be personally punished for the amendment of his life and of his deportment in the future, and to deter others from committing like offenses. . . . If the fine is made out of his property, then as to that he is punished; but, if made out of the property that has descended to his heirs . . . then it would seem he is

not punished, for *his day of temporal punishment has passed*. It is, perhaps, within the power of Congress to constitute a fine a debt due from the accused in the same relation as an ordinary debt, so that his estate, in case of his death, would be beholden . . . But this it has not done, nor attempted to do. It has provided merely a process for the enforcement of the fine as a fine but not as a debt."

Then quoting from *United States v. Pomeroy*, 152 Fed. 279, the court continued (1017):

"It (the fine) was imposed as a punishment of the defendant for his offense. If, while he lived, it had been collected, he would have been punished by the deprivation of that amount from his estate; but, upon his death, *there is no justice in punishing his family for his offense*."

And if a prosecution under a federal criminal statute is not given survival by some act of Congress, it abates upon the death of the accused *regardless* of state statutes of survival. In *Schreiber v. Sharpless* (1883) 110 U.S. 76 (80) Sharpless was sued for penalties under a federal statute governing patent infringements. He died before judgment. Continuance of the action against his estate was attempted and denied. The Supreme Court said:

"The suit was not for . . . damages . . . but for penalties . . . recoverable under the Act of Congress. . . . At common law actions on penal statutes do not survive, and there is no act of Congress which establishes any other rule in respect to actions on the penal statutes of the United States. Whether an action survives depends on the *substance* of the cause of action, not on the forms of proceedings to enforce it. As the nature of penalties and forfeitures imposed by acts of Congress and *cannot be changed by state laws*, it follows that state statutes allowing suits on state penal statutes to be prosecuted after the death of the offender, *can*

have no effect on suits in the courts of the United States for the recovery of penalties imposed by an act of Congress."

The above case has not been overruled or departed from in its ruling so far as we are aware. It has been cited in later cases including *United States v. Safeway Stores* (1944) 140 F. (2d) 834 (840) C.A. 10. In *Bowles v. Farmers National Bank* (1945) 147 F. (2d) 425 (430) C.A. 6 it was said:

> "The question of the survival of the action, which . . . is purely the creature of congressional enactment, *is not governed by state statutes of survival.* In the absence of an act of Congress, the federal courts are entitled to apply the proper rules of federal law under their own standards. Under federal law an action for penalties and forfeitures recoverable under Congressional enactment does not survive, but abates with the death of the claimed violator of the statute."

(3) The Main Objective of Criminal Punishment Was Attained by Petitioners' Dissolutions and Abatement of Their Prosecution thereby Will not Offend Public Policy.

Since the fine in a criminal prosecution is punishment only, and personal to the offender, it becomes germane to see what the legitimate aim of such punishment is. In *Hopt v. Utah* (1884) 110 U.S. 574, this Court said (579):

> "The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offense of the same kind."

More recently in *Williams v. New York* (1949) 337 U.S. 241 this Court said (248):

> "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."

It is submitted that these goals have been attained when the corporate offender has been dissolved. Its dissolution has made future crimes by it impossible. What then is the purpose of the fine? If it stands, it must be made out of the stockholders and that situation brings to mind what was said many years ago in *Felton v. United States* (1877), 96 U.S. 699 (703):

> "All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of everyone."

It also brings to mind what was said in *United States v. Mitchell*, supra, (quoting from the *Pomeroy* case) about collecting a fine from the *estate* of the person on whom it was imposed:

> * * * there is no justice in punishing his family for his offense."

The record shows that these three Petitioners were dissolved on May 2, 1955, for commercial and legal reasons independent of the indictment (R. 20, 24, 31). The record shows that their parent corporation and sole stockholder, Schenley Industries, Inc., was indicted along with them (R. 2, 46). The record shows that an officer of each of Petitioners was indicted along with them (R. 5). In view of *Section 24, Title 15, U.S.C.A.*, supra, (added to the Anti-trust laws in 1914) under which individual directors, officers or agents of a corporation can be punished for the corporation's violation of those laws, there can be little plausibility and even less merit, to any contention that public policy would be offended if dissolution of the corporation abated a Federal Anti-trust criminal proceeding against it. If public policy looks to prevention of further criminal acts *by the dissolved corporation*, it is satisfied completely,

for its dissolution ends the possibility of any further offense by it. If public policy looks to prevention of similar offenses *by other corporations* the statute just referred to (*Sec. 24, Title 15, U.S.C.A.*) accomplishes that purpose much more effectively that the prosecution of an individual noncorporate offender could ever do, because in *every* case of a *corporate* offender that statute not only multiplies the prosecutions and punishments possible from one and the same violation, by the number of directors, officers and agents which the offending corporation has, but provides for their *imprisonment* as well as fine upon conviction — punishment greatly in excess of that which could be visited upon the corporation itself as the principal offender. If public policy looks to punishment of the dissolved corporation, punishment cannot be visited upon a dead corporation any more than upon a dead person and the opinion of the court in *United States v. Mitchell*, 163 Fed. 1014 (1017), supra, may well be paraphrased by saying:

"*Its* day of temporal punishment has passed."

It can hardly be contended that public policy looks to the collection of criminal fines as a revenue raising activity on the part of the Government, distinct from the aim of punishment and prevention of crime, but if such contention were to be made the answer would be a reference to *Sec. 24, Title 15, U.S.C.A.* under which *multiple* fines can be imposed for the single *corporate* violation, whereas only *one* can be collected for the single individual *noncorporate* violation. How then can it be said that public policy would be offended if dissolution of a corporation abated the criminal prosecution against it? In the final analysis, the public policy of the *state in which was created the particular corporation* must govern, for its law alone prescribes for how long and upon what terms its corporate creature

exists. In *Northern Pacific R. R. Co. v. Meese* (1915), 239 U.S. 614, this Court said (619):

> "It is settled doctrine that Federal Courts must accept the construction of a state statute deliberately adopted by its highest court."

(4) The Pertinent Maryland Statutes Abate Criminal Prosecution of a Dissolved Corporation.

Petitioners, Melrose and CVA, were Maryland corporations and dissolved under its laws on May 2, 1955 (R. 15, 26).

The pertinent sections are short enough to repeat them here for more convenient reference. *Sec. 72(b), Article 23, Annotated Code of Maryland* (1951) (now 76(b)), provides:

> "The dissolution of the corporation shall be effective when the Articles of dissolution have been accepted for record by the Commission, provided, however, that the corporation shall continue in existence for the purpose of paying, satisfying and discharging any *existing* debts and obligations, collecting and distributing its assets, and doing all other acts required to liquidate and wind up its business and affairs."

Sec. 74(b), Article 23, id. (now Sec. 78(b)) throws light on the meaning of the preceding section 72(b). It refers to the duties of the directors of a dissolved corporation as trustees for the purposes of liquidation, unless and until a receiver is appointed, and says in its pertinent parts:

> "They shall proceed to collect and distribute the assets of the corporation, applying such assets to the extent available to the payment, satisfaction and discharge of *existing* debts and obligations of the corporation, including necessary expenses of liquidation, and distributing the remaining assets among the stockholders. Etc. Etc."

Sec. 78(a), Article 23, id. (now Sec. 82 (a)) provided (prior to 1957):

> "The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed upon them by law; nor shall such dissolution abate any *pending suit or proceeding* by or against the corporation, and all such *suits* may be continued with such substitution of parties, if any, as the court directs. No receiver shall institute suit except by order of the court appointing him; such suit may be brought in his own name as receiver or, notwithstanding its dissolution, in the name of the corporation, to his use."

No cases have been found which interpret the foregoing Maryland statutes with respect to the Question Presented.

The first two sections above quoted clearly say that after dissolution a Maryland corporation exists *only* to satisfy and discharge its *existing* debts and obligations and to liquidate and *wind up its affairs*. It is significant that the word "existing" is applied in *both* sections to the phrase "debts and obligations". The third section above quoted (Sec. 78(a) (now Sec. 82(a)) says that the dissolution shall not abate any pending *suit or proceeding* by or against the corporation and all such *suits* may be continued with such substitution of parties, if any, as the court directs. These three sections must be read in *pari materia* under familiar rules of statutory construction. It is the first two sections which ordain the *sole purposes* for which the corporation exists after dissolution. The third section, read in the light of the first two, can only have reference to *pending suits or proceedings to judicially determine corporate liability to compensate some obligation existing at the time of the corporate dissolution*. If the third section be not thus limited in meaning then it is in conflict

with the first two sections to the extent that it would permit an adjudication against the corporation wider than the statutory purpose of its continued existence. An "existing debt and obligation" within the meaning of the first two sections can only mean, of course, "existing at the date of the corporate dissolution". It will be recognized that the dissolved corporation could have an "existing obligation" to *remedy* or *compensate* a pre-existing claim of another even though such claim be not yet judicially determined. Applicable here in full force is the prior discussion in this brief of the fundamental difference between the nature and purpose of criminal prosecution and remedial or compensatory suits. The issue in the criminal case is not that of "remedy" to anyone but of "guilt or innocence." When the criminal fine is imposed it is "punishment" not compensation for any underlying obligation. The finding of guilt relates to the wrongful act but the fine, being in the discretion of the court and being punishment and not compensation, has no existence until imposed. Therefore, under the quoted Maryland statutes read in pari materia a criminal prosecution cannot be embraced within the term "pending suit or proceeding" in Sec. 78(a). Any other construction conflicts with the first two sections (Sec. 72(b) and 74(b)) since a criminal fine imposed after the corporate dissolution is not an "existing debt or obligation" of the corporation at the time of its dissolution.

While the Maryland statutes, applicable to the Question Presented (with respect to Melrose and CVA, the Maryland corporations) stood at all pertinent times as above set forth, yet changes occurred in them in 1957 which are mentioned here solely insofar as they throw light on what those statutes meant before the changes. By *Sec. 11, Chapter 399, Acts of the General Assembly of Maryland 1957*, Sec. 78(a) (now 82(a)) above quoted, was amended

by deletion of everything after the semi-colon therein, so that the section, as amended, read:

> "The dissolution of a corporation shall not relieve its stockholders, directors, or officers from any obligations and liability imposed upon them by law."

thus omitting "nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be continued * * *" (R. 58-59). The same legislature then enacted *Rule 222 of the Maryland Rules of Procedure for the Court of Appeals and Appellate Judicial Circuits of Maryland*, which read:

> "An *action* by or against a corporation shall not abate by reason of the dissolution, forfeiture of charter, merger, or consolidation of such corporation. Such action may be continued with such change of parties as the court may direct."

The net effect of the change was the replacement of the terms "suit or proceeding" and "suits" by the single word "action". However, the further significant fact appears to be that Rule 222 applies only to *civil* actions since the rules pertaining to *criminal* prosecutions commence at Rule 701.

Even the *Collier* case (*United States v. Collier* (1953 C.A. 7), 208 F. (2d) 936, 939), holding, contrary to Petitioners' contention, that dissolution does not abate criminal prosecution of a Delaware corporation) agrees that the word "action", standing alone, might reasonably be held as *not* including a criminal prosecution.

(5) The Pertinent Delaware Statute Abates Criminal Prosecution of a Dissolved Corporation. The Collier Case Discussed.

The Petitioner, Dant, was a Delaware corporation and dissolved under its laws on May 2, 1955 (R. 22).

Here again, the appropriate statute is short enough to be repeated here, in its pertinent parts, for handier reference. *Sec. 278, Title 8, Delaware Code 1953* provides:

> "All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such * * * dissolution, bodies corporate for the purpose of prosecuting and defending *suits* by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any *action, suit, or proceeding* begun or commenced by or against the corporation prior to the * * * dissolution * * *, the corporation shall, only for the purpose of such *actions, suit, or proceedings* so begun or commenced, be continued bodies corporate beyond the three-year period and until any *judgments, orders, or decrees* therein shall be fully executed."

Sec. 281, Title 8, id., while not directly involved, throws light on the meaning of Sec. 278 because it provides what the trustees or receivers of a dissolved corporation shall do with its assets and its language would forbid payment of a criminal fine levied against the corporation *after* its dissolution. *Sec. 281, Title 8*, reads, insofar as here pertinent:

> "The trustees or receivers of a dissolved corporation, after payment of all *allowances, expenses and costs*, and the satisfaction of all *special and general liens* upon the funds of the corporation to the extent of their lawful priority, shall pay the other *debts due from the corporation*, if the funds in their hands shall be sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts in the manner that shall be directed by an order or decree of the court for that purpose. If

there shall be any balance *remaining after the payment of the debts and necessary expenses*, they shall distribute and pay the same to and among those who shall be justly entitled thereto, as having been stockholders of the corporation, or their legal representatives."

Both of these sections are part of the Delaware law dealing with dissolved corporations and must be read in *pari materia*. So read, their preponderating rationale is that criminal prosecution of the defunct corporation is excluded from the purpose of its "after-life". The terms "allowances, expenses and costs", "special and general liens", and "debts due from the corporation", certainly do not embrace criminal prosecutions or fines assessed *after* the dissolution.

No cases have been found wherein Delaware has interpreted her own corporate dissolution statutes with respect to the Question Presented. However, those statutes have received interpretations on that point in several of the Federal Courts of Appeal, and there is conflict among them. Taking up these cases in order of their priority, the first is *United States v. Safeway Stores, et al.* (1944), 140 F. (2d) 834 C.C.A. 10, in which a Delaware corporation and others were indicted under the Sherman Act. It, and four other corporate defendants, had dissolved just a few days prior thereto. Motions to dismiss were filed on behalf of each, predicated upon the dissolutions. The District Court granted the motions. The Court of Appeals considered the appropriate Delaware statute, which continued existence of dissolved corporations for the purpose of defending "suits" by or against them, and held that a criminal prosecution was not included. However, the equivalent California statute, also before the court, used the term "action or proceeding", and the court held that a criminal prosecution was not therein embraced. Thus, between the

two statutes, the court considered the terms "action, suit and proceeding" which cover the wording in Sec. 278 of the Delaware statute here under consideration. The opinion commends itself as well considered and persuasive. In arriving at its holding the court noted, among other things (840):

> "The death of an individual and the administration of his estate, and the dissolution of a corporation and the winding up of its affairs, are the same in principle."

The next case came along some eight years later. In *United States v. Line Material Co.* (March 1953), 202 F. (2d) 929, C.A. 6, a Delaware corporation was indicted under the Sherman Act in November 1948. It was dissolved by merger in July 1949. In May 1952 it moved to dismiss because its corporate existence had terminated. At that time the Delaware statute contained the words "action, suit or proceeding" as it does in the section here under consideration. The District Court granted the motion to dismiss. The Court of Appeals affirmed and held for reasons stated in the opinion that criminal prosecutions were not embraced in the quoted term.

Later in the same year came *United States v. P. F. Collier & Son* (Dec. 1953), 208 F. (2d) 936, C.A. 7, which held *directly contrary* to C.A. 10 and C.A. 6 on the same question. There a criminal information was filed against a Delaware corporation for an alleged violation of the Fair Labor Standards Act. A motion to dismiss was filed on the ground that the corporation had previously dissolved in the same year. The District Court granted the motion but the Court of Appeals reversed and held that the words "any action, suit or proceeding" as contained in the Delaware statute (940):

> ". . . embrace, so we think, all forms of litigation, civil, criminal, bankruptcy and admiralty."

It is submitted that the decision is erroneous for two reasons, the *first* of which is that the court failed to recognize the fundamental distinction between "criminal" liability and "civil" liability. This is evident from such language in the opinion as (940):

> ". . . We see no reason why by the same token its *liabilities, both civil and criminal,* are not also preserved."

and (940):

> ". . . if dissolution . . . works no extinguishment of a legal right, we discern no reason why it works an extinguishment of a *legal liability, whether civil or criminal.*"

and (940):

> ". . . no sound reason occurs why a legislature would intend to relieve a dissolved corporation of its *criminal liability* and at the same time preserve its *civil liability.*"

What *civil liability* is presents no problem. It is the obligation to compensate a just claim — tort, contract or statutory. But what is this *criminal liability* which the *Collier* opinion has placed on equal footing? It is not an obligation to compensate, for the issue in the criminal case is not liability to compensate but simply "guilt or innocence" of a public offense. There *can* be no "criminal liability" of the accused at the time of the indictment, for the presumption of innocence attends him then and thereafter until he is duly adjudged guilty. Even at *that* time there is no "criminal liability" resting upon him *unless* and *until* the court imposes some form of punishment which, as has been shown, is in the discretion of the court and can have no existence until imposed, and when imposed, can have no retroactive effect precisely because it *is* punishment and *not* compensation. Speaking of "liability" as used in a

criminal statute, this Court said in *United States v. Reisinger* (1888), 128 U.S. 398 (403):

> ". . . this word 'liability' is intended to cover every form of *punishment* to which a man subjects himself, by violating the common laws of the country."

and in *Lovely v. United States* (1949), 175 F. (2d) 312, C.A. 4, cert. den. 338 U.S. 834, the court quoted with approval (317):

> "and 'liability' and 'forfeiture' are synonymous with 'punishment' in connection with crimes. . . ."

It is clear, therefore, that the term "criminal liability" can only mean *punishment* and since there had been none imposed in the *Collier* case at the time of the corporate dissolution there, the court was in error in treating it as something in existence to be "preserved" by the statute. The *second* reason for suggesting that the *Collier* decision is in error was the failure of the court in that case to apply the rule of *ejusdem generis* in construing the statutory phrase "action, suit or proceeding" in Sec. 278 of the Delaware Corporation Law. It was the word "proceeding" in that phrase which alone induced the court to hold that criminal prosecutions were included. *This is apparent from the following language in the opinion* (939):

> "We agree that the word 'suit' or the word 'action' standing alone might reasonably be held as *not* including a criminal prosecution. . . ."

Thus, in construing a state statute the court had before it in the *Collier* case two words "suit" and "action" (which the court agreed suggested only civil matters) followed by the broader word "proceeding". The rule of *ejusdem generis* exists in the law to help construe doubtful phraseology in just such a case. In *Chichester Chemical Co. v. United States (1931)*, 49 F. (2d) 516 C.C.A.D.C. it was said:

> "When an author makes use, first, of terms each evidently confined and limited to a particular class of a

known species of things, and then, after such specific enumeration, subjoins a term of very extensive signification, this term, however general and comprehensive in its possible import, yet, when thus used, embraces only things of 'ejusdem generis' — that is, of the same kind or species — with those comprehended by the preceding limited and confined terms."

In *Goldsmith v. United States* (1930), 42 F. (2d) 133, C.C.A. 2, cert. den. 282 U.S. 837, it was said (137):

> "The rule of ejusdem generis means that, where a general term in the statute follows specific words of a like nature, it takes its meaning from the latter, and is presumed to embrace persons or things of the kind designated by the specific words."

In *Phillips v. Houston National Bank* (1940), 108 F. (2d) 934, C.A. 5, it was said of the rule of ejusdem generis:

> "It serves to prevent general words, loosely used in connection with specific terms, from extending the operation of the instrument into a field not really intended."

The rule is related to the rule *"noscitur a sociis"* and sometimes the terms are used interchangeably although in a technical sense it is a limited or specific application of *noscitur a sociis*. In *Fitch v. United States* (1945), 323 U.S. 582, this Court applied the rule of ejusdem generis in holding that the term "a transportation, delivery, insurance, installation, or other charge" as used in the statute, did not embrace an advertising and a selling charge which, the Court said, were dissimilar in nature to the specific charges enumerated just before the term "or other charge". In *Haberman v. Equitable Life Insurance Society* (1955) 224 F. (2d) 401 C.A. 5, cert. den. 350 U.S. 948, the question was whether, in a Texas statute defining what was included in the term "security or securities", the words "investment contract" included an insurance annuity. The court held it did not. It said (405):

"The rule of construction that the meaning of statutory words is to be determined by their context, or noscitur a sociis, should be applied in determining the meaning of 'investment contract' in the Texas act. These words having *no fixed technical significance*, their meaning must be ascertained from the specific terms in connection with which they are used; that is, they should be interpreted as referring to instruments of the *same general type* as the specifically enumerated ones. It seems certain to us that the legislature meant by this language to give color and scope to the specific terms, and to fill in any interstitial loopholes in the area staked out, so to speak, by the specific terms; not to extend that area radically so as to include quite dissimilar things which have precise and well known names which the legislature could easily have included expressly had it wished to do so. * * *. While annuities are sometimes called investments, that is not an apt characterization."

It is submitted that if the court in the *Collier* case had applied the rule of ejusdem generis, a different result would have been reached there and in the case at hand.

Before leaving the *Collier* case, adverse comment is due with respect to three references made therein to justify the decision in that case (that "action, suit or proceeding" in *Sec. 278, Delaware General Corporation Law* (supra) includes criminal prosecutions). *First*, there was reference to the fact that in the *Federal Rules of Criminal Procedure* a prosecution is uniformily referred to as a "proceeding". It is not perceived how the choice of a word by the rule makers in the comparatively recent (1946) *Federal Rules of Criminal Procedure* could have the remotest bearing on the meaning of a word or phrase in a completely unrelated Delaware statute. One is moved to add that after the Federal Rules of *Civil* Procedure came out, it was only logical to designate the later rules of

criminal practice as the Federal Rules of *Criminal* Procedure. Second, there was reference to *Bahen & Wright v. Com'r* 176 F. (2d) 538 C.A. 4. But that case was not a criminal case. It involved *administrative proceedings* to collect federal taxes which had accrued during the life of a Delaware corporation. Since there could be considerable doubt as to whether administrative proceedings would fit under the label of either "suit" or "action", the case illustrates a sound reason for use of the word "proceeding" in the statute (in addition to the words "suit" and "action") other than forcing inclusion of criminal cases or prosecutions. *Third*, there was reference to *Addy v. Short*, 8 Terry 157 (Del.) 89 A. (2d) 136, but this, again, was not a criminal case. It held that dissolution of a Delaware corporation (and expiration of the three year winding up period) did not extinguish a possibility of reverter held by the corporation. It is submitted that none of those references was apposite to the decision which it was cited to support.

The next case was *United States v. United States Vanadium Corporation, et al.* (1956), 230 F. 2d 646, C.A. 10, cert. den. 351 U.S. 939. On September 2, 1948, a criminal antitrust information was filed against a Delaware corporation which pleaded "not guilty". Thereafter in September, 1950, its corporate existence was terminated and a motion was filed to dismiss the information on that ground. The District Court granted the motion (sub nom *United States v. Union Carbide Corporation*, 132 F. Supp. 388) and it was affirmed by C.A. 10, which said (230 F. 2d 649):

> "Since the circuits are not in agreement as to the law of Delaware and until the Supreme Court has spoken, we adhere to the law as declared in the Safeway case. . . ."

As indicated, this Court denied certiorari.

Finally, in August 1958 came the decision which is here appealed from, *Melrose Distillers et al v. United States* (1958) 258 F. (2d) 726 C.A. 4, which so completely espouses the *Collier* case that it shares its infirmities and makes unnecessary further comment here.

(6) New York has Construed "Action, Suit or Proceeding", in a Distantly Related New York Statute, to Exclude Criminal Trials.

In *Schwarz v. General Aniline & Film Corp.*, (1953) 305 N.Y. 395 113 N.E. (2d) 533, Schwarz, an officer and director of General Aniline, etc., was indicted with it and others for violation of the Sherman Anti-trust Act. He pleaded "nolo contendere" and was fined. *Section 64 of the General Corporation Law of New York* was described in the opinion of the Court of Appeals of New York (113 N.E. (2d) 535) as follows:

> "* * * Section 64 * * * contains broadened provisions for assessment against a corporation, of the expenses of any person who is made a party to '*any action, suit or proceeding*' because of his being an officer, director or employee, unless he shall have been adjudged that he was liable for neglect or misconduct in the performance of his duties."

Schwarz brought an action for assessment against the corporation of his expenses in the anti-trust case. The court held that the phrase "any action, suit or proceeding" did *not* include a criminal matter. Said the court (536):

> "We note, too, that the quite similar New Jersey, Kentucky and Delaware statutes * * * all include the same verbiage: 'action, suit or proceeding', and it is not claimed that any of those statutes have ever been held to contemplate * * * criminal trials. Our own conclusion is that the draftsman who was responsible for the statutory language, 'any action, suit or pro-

ceeding' was being overcautious in making sure that the law would apply in an 'action' at law, a 'suit' in equity, or a special 'proceeding'."

(7) The "Spark-of-Life" Theory Untenable.

It was Respondent's theory in the Court of Appeals that so long as a dissolved corporation retained any life for any purpose, it was amenable to prosecution under the Sherman Act because of *Sec. 7, Title 15, U.S.C.A.* (supra). It is submitted that the section simply means that corporations and associations, whether Federal, State, Territorial or Foreign, can be guilty of violating the Sherman Act, as well as natural persons. No case has been found which forces upon this section strained meaning ascribed to it by Respondent.

Furthermore, Respondent's "spark-of-life" theory is counter to the principle in *Chicago Title and Trust Co. v. Wilcox Building Corp.* (1937) 302 U.S. 120. In that case the question was close to the Question Presented here. It was whether a dissolved Illinois corporation, which still had a very limited existence under state law, could avail itself of the Federal Bankruptcy Act. The lower court held "yes". This Court said "No", and that although the corporation still had a spark of life it was not sufficient to permit it to file a petition under the Bankruptcy Act. Mr. Justice Cardozo wrote a *dissenting* opinion (302 U.S. 130-134). In it he pointed out that the Federal Bankruptcy Act was available to *"any corporation"* and that under its definitions *"corporations"* meant *"all bodies having any of the powers and privileges of private corporations"*. He pointed out that the corporation there involved still had corporate powers, although limited. As he put it, *"a fragment of the corporate power was thus untouched*

by dissolution" and, *"Here the state has elected to keep the corporation in existence, maimed but still alive."* He went on to say that this was enough to bring it within the reach of the Federal Bankruptcy Act. Further, he said that it was not within the competence of the state to preserve the artificial entity for a purpose of her own and destroy it for the purpose of withdrawal from the supremacy of federal law. This dissenting opinion largely, if not wholly, embraces Respondent's contention under *Sec. 7, Title 15, U.S.C.A.* But it did not become the law.

CONCLUSION

It seems appropriate to say in conclusion, with respect to Delaware particularly, that corporations in vast number are organized and existing under its laws. Respondent says in its Memorandum filed in this court to the Petition for Certiorari in this case:

> "A substantial, if not the major, number of corporate defendants in Sherman Act cases are Delaware corporations * * *."

From this conceded fact the inference arises that Delaware is at all times keenly aware of the interpretations which her corporation statutes are receiving in other jurisdictions. From the *Safeway* case, in 1944 until the decision here appealed from in 1958, the majority holding in the federal courts of appeals on the question was that federal criminal prosecution of a Delaware corporation was abated by its dissolution under the Delaware statute. The logical assumption is that if Delaware did not view her own statute in the same light, she would have amended it to nullify such holding.

It is respectfully submitted that as to each of the Petitioners, its fine should be set aside, its conviction reversed and the indictment dismissed, by the appropriate order, judgment or mandate of this court.

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